



MULTISTATE TAX COMMISSION

REPORT

**Uniformity Committee Meeting
Radisson Hotel Salt Lake City Downtown
215 W. South Temple
Salt Lake City, Utah**

***March 2, 2016
8:30am - 5:00pm Mountain Time***

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This report is also available on the MTC website at mtc.gov. Follow the links to the meeting event.

To: Multistate Tax Commission Uniformity Committee
From: Helen Hecht, MTC General Counsel
Subject: Report on Recent Federal Legislation Affecting States &
State Legislation Affecting the Uniformity Committee
Date: February 25, 2016

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Federal Legislation

Permanent Internet Tax Freedom Act

On February 24, 2016, President Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015, HR 644, which contains the Permanent Internet Tax Freedom Act, as amended, which gives grandfather states until 2020 to phase out their taxes on internet access and otherwise makes the moratorium on taxes on internet access permanent.

The history of ITFA, like the history of P.L. 86-272, shows how a federal law preempting state taxes which was initially enacted as a temporary provision can become permanent. Originally, advocates in favor of ITFA asserted that it was necessary to shield the internet from the burdens of taxation to allow it to develop unhindered by that burden, even though other related services such as telephone or cable services would be allowed to be taxed. Many analysts have said that there was no good policy reason to continue to extend ITFA. Politicians may have been worried, however, that allowing the moratorium to expire would be seen as imposing a “new” tax.

One of the critical provisions of ITFA, and one reason why its permanent extension may have been so important to proponents, is the “anti-discrimination” clause. That clause requires that taxes on sales over the internet not be taxed more, nor administered or imposed differently, than taxes on sales of “similar” items through other means. This provision has been held to prevent state law collection duties that would apply differently to internet sellers than to sellers through other means. See *Performance Marketing Association Inc. v. Hamer*, 2013 IL 114496 (Ill. 2013.) In general, this provision must be considered by any state seeking to impose tax on sales over the internet to ensure that similar transactions are treated similarly.

Bipartisan Budget Act of 2015 – Repeal of TEFRA and New Partnership Rules

Section XI of the Bipartisan Budget Act of 2015 contains amendments to IRC Sections 6221 – 6241, which change the rules under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) that govern how partnerships and partners are audited and assessed. The new rules generally allow the IRS to assess tax liabilities at the partnership level unless the partnership elects to follow IRS regulations (still to be issued) requiring it to issue amended Schedule K-1s to affected partners. Under either alternative, the partnership must be represented by a partner or other person who has the authority to make binding decisions concerning the audit. Smaller, first-tier partnerships can elect out of the new rules entirely and, in that case, the IRS must audit partnership issues at the partner level and assess the partners directly.

Temporary Highway Funding Bill – New Federal Tax Filing Deadlines

A temporary highway funding bill passed Congress (P.L. 114-41) which also contained provisions changing the deadlines for filing certain federal tax returns. C corporations not having an extension must file within 3 ½ months and pass-through entities must file within 2 ½ months of the close of their tax year. Automatic extensions have been changed as well – and the periods differ for individuals, pass-throughs and C corporations. The difficulty faced by taxpayer-owners of interests in tiered- partnership structures has been getting necessary information with sufficient time to file the owner’s return. Because entities can still get automatic extensions, however, this problem is not alleviated.

Proposed Federal Legislation

Prospects for Congressional Action on State Jurisdiction to Impose Use Tax Collection

State government advocates, including the National Governors Association, previously took the position that they would vigorously oppose the passage of a permanent extension of ITFA (see above) until Congress had reached a deal to allow states to assert jurisdiction over remote sellers for the purpose of collecting use taxes. Groups like the NGA and the National Conference of State Legislatures (NCSL) are now arguing that since Congress refuses to act on that critical issue, the states should mount a challenge to *Quill* in the courts. The NCSL has drafted model legislation for that purpose (see further discussion below), [http://www.ncsl.org/Documents/fiscal/2016 Sales-Use Tax%20Nexus .pdf](http://www.ncsl.org/Documents/fiscal/2016%20Sales-Use%20Tax%20Nexus.pdf). In general, representatives of these groups and others have expressed the belief that pressure from the states exerted through such challenges will force Congress to act.

There are currently two bills that have been introduced that would address the issue. The first is the Marketplace Fairness Act of 2015 (MFA), S. 698 (Enzi), which is a version of legislation that previously passed the Senate. The second is H.R. 2775, the Remote Transactions Parity Act of 2015 (Chaffetz), which is pending before the House Judiciary Committee. The chairman of that committee, Bob Goodlatte, has floated a third proposal which has not yet been introduced.

On June 2, 2015, the Judiciary Committee's Subcommittee on Regulatory Reform held a hearing at which the Chair of the Commission, Julie Magee, Commissioner of Alabama's Department of Revenue, testified—generally favoring the MFA approach and opposing the approach proposed by Chairman Goodlatte, which would impose an origin-sourcing regime for taxing remote sales.

The two chambers are still divided over how to address the issue and it is not clear how their differences can be resolved. As of today, there are 72 legislative days remaining in the House before the election.

State Legislation

North Carolina – Market Sourcing

North Carolina HB 259, Session Law 2015-268 – directs the Revenue Laws Study Committee to study the calculation of the sales factor under using market-based sourcing. To help the Committee determine the effect of market-based sourcing on state revenues and corporate taxpayers, each corporate taxpayer that satisfies certain requirements is required to file an informational report with the Department of Revenue. The Department of Revenue is to issue guidelines for market-based sourcing which general follow the Commission's amendments to compact Art. IV (UDITPA) Sec. 17 and the draft model regulations, or other model apportionment regulations that are generally consistent.

Proposed State Legislation

South Dakota – Expanding Nexus Over Remote Sellers

The South Dakota Senate has passed a bill that would expand nexus over remote sellers for use tax collection purposes (following the NCSL model discussed above). Senate Bill 106 provides extensive legislative findings. It would make a seller responsible for collecting the tax if the seller has either “gross revenue from delivery of tangible personal property, any product transferred electronically, or services into South Dakota in the previous calendar year or current calendar year” in excess of \$100,000; or more than 200 separate sales into the state in the previous calendar year or the current calendar year. The new statute also provides a means for the state court to hear a declaratory action to determine if the collection obligation is valid under state and federal law and instructs the circuit court to “act on this declaratory judgment action as expeditiously as possible.” It further provides that the law will be enjoined during the pendency of the case. Appeal of the circuit court’s judgment is taken directly to the state supreme court and “shall be heard as expeditiously as possible.” Finally, the law provides that there shall be no obligation to collect and remit the sales tax as required under its provisions retroactively.

The bill does not redefine “seller” for purposes of use tax collection, so it presumably would not extend to marketplaces or other platforms or providers who function to sell the products or services of third parties.

Oklahoma – Expanding Nexus Over Remote Sellers

The Oklahoma House is considering legislation, House Bill 2531, that would change the definition of “maintaining a place of business in this state” which will now include a number of specific actions taken by third parties on behalf of a vendor, and requires that the administration may not agree that any vendor does not have a place of business in the state (despite meeting the definition) unless that agreement is approved by the legislature. The bill also defines “marketplace provider” and “marketplace seller” and provides that the marketplace provider must collect tax on sales into the state made by marketplace sellers unless it obtains evidence of that seller’s Oklahoma registration.